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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit *En Banc*

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Does section 437h of the Federal Election Campaign Act entitle defendants in a judicial enforcement proceeding brought by the Federal Election Commission to present constitutional claims to an *en banc* court of appeals when the same claims could be raised as defenses in the enforcement proceeding?

2. Does the First Amendment permit Congress to limit contributions of fundraising resources and other administrative support by unincorporated associations to multicandidate political committees in order to prevent circumvention of the per-candidate contribution limits upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976)?

3. May Congress constitutionally limit contributions of fundraising resources and other administrative support by unincorporated associations to related multicandidate political committees while permitting corporations and labor unions, which are prohibited from making any contributions directly to candidates, to contribute unlimited administrative support to their separate segregated funds?

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BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

INTEREST OF AMICUS

Common Cause submits this Brief Amicus Curiae with the consent of the parties. Common Cause is a nonprofit membership corporation organized to promote, on a nonpartisan basis, its members' interests in civic betterment and electoral reform. It has participated actively in the enactment and implementation of federal election campaign reforms and in litigation concerning them.[1] Common Cause supports the constitutionality of the challenged provisions of the Federal Election Campaign Act of 1971, as amended ("the Act").[2] Common Cause also believes that the special judicial review mechanism established by

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[1] *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

[2] 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979) (and scattered sections of other titles).

section 437h of the Act was improperly invoked in this case.

COUNTERSTATEMENT

The Statutory Scheme

Under the Act, individuals and unincorporated associations may contribute up to $1,000 per year directly to a federal candidate or the candidate's authorized political committees. 2 U.S.C. § 441a(a)(1)(A).[3] Individuals are subject to an annual $25,000 aggregate contribution limit, 2 U.S.C. § 441a(a)(3); unincorporated associations are not. This Court upheld these limitations on contributions in *Buckley v. Valeo*, 424 U.S. 1 (1976).

There are also avenues for making larger contributions. First, Congress provided that individuals and unincorporated associations may contribute up to $5,000 to political committees not affiliated with a particular candidate. 2 U.S.C. § 441a(a)(1)(C).[4] It is the constitutionality of the $5,000 limit that is challenged in this case.

Second, Congress has created a particular type of unaffiliated political committee called the multicandidate committee, which—unlike individuals, associations, or other political committees—may contribute up to $5,000 to a federal candidate. 2 U.S.C. § 441a(a)(2). To qualify as

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[3] The Act defines "contribution" to include "any gift . . . of money or anything of value made . . . for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

A "political committee" is "any committee . . . which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures . . . in excess of $1,000 during a calendar year." *Id.* § 431(4)(A).

[4] Section 441a(f) of the Act prohibits receipt by a political committee of any prohibited contribution.

The legislative history identifies two principal reasons for limitations on contributions to political committees: (1) to prevent circumvention of the limits on direct contributions to candidates and (2) to assure that the Act's disclosure provisions work as intended. H.R. Rep. No. 1057, 94th Cong., 2d Sess. 57-58 (1976).

a multicandidate political committee, a political committee must receive contributions from at least 50 persons and make contributions to at least five federal candidates. 2 U.S.C. § 441a(a)(4).[5] Appellant California Medical Political Action Committee ("CALPAC") is a multicandidate political committee that is "connected" to appellant California Medical Association ("CMA"), a not-for-profit unincorporated membership association comprised of more than 25,000 California physicians. *See* Complaint ¶ 6, Joint Appendix ("J.A.") 6; 2 U.S.C. § 431(7).

An entirely different statutory scheme applies to corporations and labor unions. They may not make contributions to or expenditures on behalf of federal candidates. 2 U.S.C. § 441b. They may participate in the federal electoral process only by establishing and providing "administrative support" to separate segregated funds, 2 U.S.C. § 441b(b)(2)(C), whose activities are themselves closely regulated. *See* 2 U.S.C. § 441b(b)(3). As the parties have used the term in this case, administrative support refers to the provision of such in-kind goods and services (and funds to purchase these goods and services) as assistance in fundraising, office space, phones, salaries, utilities, supplies, legal and accounting fees, and other expenses incurred in setting up and running a political committee.[6]

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[5] In addition, individuals and unincorporated associations may generally make unlimited independent expenditures of their own money to express their own political views. 2 U.S.C. § 431(17). 26 U.S.C. § 9012(f)(1) limits expenditures by political committees to $1,000 where they are made on behalf of a presidential candidate who has opted for public funding under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9042 (1976 & Supp. III 1979). *But see Common Cause v. Schmitt*, No. 80-1609 (D.D.C. Sept. 30, 1980) (3-judge court), *juris. statement filed*, Nov. 25, 1980 (No. 80-847).

[6] *See* 11 C.F.R. § 114.1(b) (1980). Corporations and unions may provide such services without limit for "the establishment, administration and solicitation of contributions to a separate segregated fund." 2 U.S.C. § 441b(b)(2)(C).

Proceedings Against CMA and CALPAC

In October 1978, the Federal Election Commission ("FEC" or "Commission") determined that there was "reason to believe" that CMA had made, and CALPAC had accepted, contributions in excess of $5,000 per year in violation of sections 441a(a)(1)(C) and 441a(f). On April 19, 1979 the Commission concluded that there was "probable cause to believe" that CMA and CALPAC had violated sections 441a(a)(1)(C) and 441a(f) in 1976, 1977 and 1978, *see* 2 U.S.C. § 437g(4)(A)(i), and so advised CMA and CALPAC. On the same day, the Commission voted to commence a federal district court action against CMA and CALPAC to enforce the Act. *See id.* § 437g(6)(A). On May 22, 1979 the Commission filed its complaint for civil penalties and injunctive relief in the United States District Court for the Northern District of California. *See id.*

The Action Under Section 437h of the Act

After the Commission had voted to bring an enforcement action, but before the filing of its enforcement action complaint, appellants filed an action against the Commission under 2 U.S.C. § 437h.[7] Appellants attacked the constitutionality of the provisions of the Act the Commission was seeking to enforce and sought injunctive and declaratory relief; they asked the district court to certify questions for decision by the *en banc* United States Court of Appeals for the Ninth Circuit pursuant to section 437h(a).

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[7] Section 437h(a) provides in part that:

> [A]ny individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Appellants claimed that CMA wishes to provide administrative support to CALPAC in excess of $5,000 per year. Appellants alleged that (1) the statutory limitation on contributions of administrative support impermissibly burdens interests protected by the First Amendment and (2) because corporations and labor unions are free to contribute unlimited administrative support to their separate segregated funds,[8] the Act violates precepts of equal protection implicit in the Fifth Amendment's due process clause. The district court denied the Commission's motion to dismiss and, pursuant to section 437h(a), certified four questions that framed these constitutional claims to the *en banc* court of appeals.[9]

The Ninth Circuit rejected all of the constitutional claims asserted. Relying on *Buckley v. Valeo*, the court of appeals found that the contribution limits impose only inconsequential restrictions on speech interests. The Court observed that these restrictions pale in the light of the "potent alternative means of expression" available to unincorporated associations like CMA. J.S. App. A-15. It noted that CMA and its members may themselves make contributions, *id.* at A-13, as long as the per-candidate and per-committee limits are respected, and that CMA, its members, and CALPAC may make unlimited independent expenditures to express their own views. *Id.* at A-11 to A-12. The court concluded that the limitations are supported by compelling governmental interests that Congress had clearly articulated. *Id.* at A-17.

The court of appeals also rejected the equal protection claim. The court held that the Act does not discriminate against appellants; to the contrary, associations like CMA are favored under the statute and are

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[8] 2 U.S.C. § 441b(b)(2)(C); *see id.* §§ 431(8)(B)(vi), 431(9)(B)(v).

[9] The questions are set out in the opinion of the court of appeals. Appendix to Appellants' Jurisdictional Statement ("J.S. App.") A-2 to A-3 n.1.

free of constraints that apply to corporations, unions, and individuals. *Id.* at A-23.

Appellants now seek to appeal under 2 U.S.C. § 437h(b), and the Commission has moved to dismiss the appeal.[10]

SUMMARY OF ARGUMENT

I.

The courts below should not have permitted CMA and CALPAC to proceed under the extraordinary certified-question procedure provided in section 437h. Appellants could have raised their constitutional claims as defenses in the FEC enforcement proceeding, and section 437h was not intended to pretermit routine FEC enforcement actions. Resort to section 437h was particularly inappropriate here, where an adequate factual record for the resolution of constitutional questions was not available to the court of appeals but could have been developed in the enforcement action.

II.

Appellants' First Amendment claim is without merit. The impact of section 441a(a)(1)(C) on speech interests is negligible. CMA and its members have numerous avenues for communicating their political views. Any "speech" element in contributions of administrative support to a political committee is extremely indirect and attenuated. Section 441a(a)(1)(C) serves the important purpose of preventing circumvention of the per-candidate contribution limits of the Act, which were intended to prevent undue influence and the appearance of undue influence in federal political campaigns and which were sustained in *Buckley v. Valeo.*

III.

Appellants' equal protection claim is also without merit. Given all of the avenues for electoral participa-

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[10] By order dated October 6, 1980, this Court postponed decision as to jurisdiction until the hearing on the merits. J.A. 32.

tion open to CMA, CMA cannot credibly assert that, as compared to corporations and unions, it is disadvantaged or burdened by the statutory scheme. Moreover, Congress chose to exempt administrative support to separate segregated funds because such a fund is the sole vehicle by which a corporation or union may participate in the electoral process, and Congress may have felt that the exemption was a practical necessity if the corporation were to be able to maintain the fund at all. No such similar necessity is present with respect to an unincorporated association and a political committee.

ARGUMENT

I. JUDICIAL REVIEW UNDER THE EXTRAORDINARY PROCEDURES IN SECTION 437h IS NOT APPROPRIATE WHERE JUDICIAL ENFORCEMENT PROCEEDINGS ARE PENDING.

Section 437h, which directs district courts to certify constitutional questions in "appropriate" actions is merely a congressional command for expedition.[11] The statute leaves it to a court to decide whether the actions

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[11] The legislative history of section 437h appears to consist principally of the explanation provided by Senator Buckley in floor debates:

> *It merely provides for the expeditious review of the constitutional questions I have raised.* . . . [I]f, in fact, there is a serious question as to the constitutionality of *this legislation*, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562 (1974) (emphasis added). There is every reason to think that Senator Buckley was concerned only about prompt review of the 1974 amendments in the case he intended to and did bring. *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 385 (1977). Indeed, his reference to "this legislation" literally excludes the provisions of the Act here under review, passed in 1976 after Congress adopted section 437h. At the very least, therefore, section 437h should be read narrowly in all situations not related to the 1974 legislation.

instituted are "appropriate," in light of the nature of review under section 437h and the well-established limitations on the availability of equitable relief in federal courts.[12]

In view of the enormous burdens that expedited *en banc* proceedings impose on a court of appeals, a district court should not deem the case "appropriate" and "immediately" certify constitutional questions under section 437h unless a claimant has shown not only irreparable harm,[13] but also that other remedies are plainly inadequate.[14] In this case, the district court should have granted the Commission's motion to dismiss for want of equity jurisdiction, and should not have certified questions to the Ninth Circuit.

The section 437g enforcement action gave appellants a chance to raise as defenses the very same constitutional claims that they elected instead to pursue under section 437h. Appellants would have been able to litigate such claims in the very same district court where they elected to file their own complaint. Moreover, since section 437g (10) directs that enforcement proceedings be expedited on district court calendars, judgment would have been available at least as soon in the enforcement case as in the section 437h proceeding.[15] In short, whatever impact

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[12] *Clark v. Valeo*, 559 F.2d 642, 661 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring), *aff'd mem., Clark v. Kimmitt*, 431 U.S. 950 (1977).

[13] *E.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

[14] Even in an ordinary case, the existence of an adequate alternative remedy precludes injunctive relief, *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 772 (1947), and is also a factor that militates against the availability of declaratory relief. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 295-96 (1964); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 133 (2d ed. 1973). *See also Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

[15] In fact, the delays incident to *en banc* procedure in the courts of appeals make it likely that appellate resolution may be available faster in appeals from enforcement actions than in section 437h

the Commission's construction of the statute is alleged to have had on the conduct of CMA and CALPAC could be as readily alleviated in one proceeding as in the other.[16]

Requiring enforcement actions to run their course under section 437g may obviate the need for judicial reso-

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proceedings. *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 384-87 (1977). (To be sure, section 437g actions are not to be advanced ahead of 437h actions on district court calendars, 2 U.S.C. § 437g(10), but the pendency of an enforcement action and an unrelated 437h action before the same district judge is unlikely.)

Indeed, to accept appellants' interpretation of section 437h is to invite enforcement action defendants to delay such proceedings for months by bringing new actions raising constitutional defenses that will have to be resolved before the enforcement action can proceed. That perverse result is contrary to Congress' intent that enforcement actions be speedily concluded and is unnecessary in view of the fully adequate and speedy remedy that section 437g provides to litigants.

[16] *Reisman v. Caplin*, 375 U.S. 440 (1964), and *W.E.B. DuBois Clubs v. Clark*, 389 U.S. 309 (1967) (*per curiam*), are directly in point. In *Reisman*, petitioners brought an action for declaratory and injunctive relief. They claimed, *inter alia*, that IRS subpoenas threatened an unconstitutional search and seizure. This Court ruled, however, that petitioners had "an adequate remedy at law and that the complaint is therefore subject to dismissal for want of equity." 375 U.S. at 443. Petitioners could contest the subpoenas in any action brought by the Secretary of the Treasury in federal district court to enforce them, and all objections thereto, including constitutional objections, could then be interposed and adjudicated. *Id.* at 449-50.

In *DuBois*, petitioners sought a federal court declaration that provisions of the Internal Security Act of 1950 (requiring registration of "Communist front organizations") were unconstitutional under the First Amendment and sought to enjoin enforcement of such provisions before the Subversive Activities Control Board. This Court affirmed dismissal of the complaint. It held that if the SACB subsequently required registration, then petitioners could immediately appeal that order in a federal court of appeals and raise constitutional claims. Given this perfectly adequate remedy, the Court "decline[d] . . . to permit substitution of an injunctive proceeding for the civil proceeding which Congress has specifically provided." *Id.* at 313.

lution of constitutional questions. The enforcement court may rule for the defendant on factual, statutory or other non-constitutional grounds. In such circumstances, dismissal of section 437h complaints best serves the principle "more deeply rooted than any other in the process of Constitutional adjudication that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." [17]

Finally, deference to the enforcement action is especially appropriate, where, as here, there is need to develop an adequate factual record—a process that can be readily accomplished in an enforcement action. For example, to evaluate the strength of the governmental interests that prompted enactment of the provisions in question, it would be useful to know about the roles that political committees and unincorporated trade associations play in federal elections; the extent to which limitations on contributions to candidates can be evaded absent the restrictions in question; and the amounts that corporations and unions expend on administrative support.[18] Thus, here, as in *United States v. UAW*, 352 U.S. 567, 591-92 (1957), adjudication was inappropriate in the absence of a "concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." [19]

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[17] *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). *See also Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[18] *See, e.g., Martin Tractor Co. v. FEC*, 627 F.2d 375, 383-84 (D.C. Cir. 1980) (noting the importance of facts in First Amendment cases).

[19] Appellants' reliance on *Bread Political Action Comm. v. FEC*, 591 F.2d 29 (7th Cir. 1979), in support of the procedure followed below is misplaced. The court of appeals there expressly recognized that enforcement proceedings provide a proper means for obtaining judicial review of constitutional issues. *Id.* at 32-33. The procedure adopted without discussion in *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (*en banc*), on which appellants also rely, is clearly wrong.

II. THE LIMITATION ON CONTRIBUTIONS OF ADMINISTRATIVE SUPPORT TO POLITICAL COMMITTEES IS FULLY CONSISTENT WITH THE FIRST AMENDMENT.

The court of appeals properly rejected appellants' argument that the First Amendment precludes Congress from limiting the administrative support an unincorporated association may contribute to a multicandidate political committee. In *Buckley v. Valeo*, this Court held that reasonable limitations on political contributions are well within the power of Congress. The analysis in *Buckley* is fully applicable to limitations on contributions by unincorporated associations to multicandidate committees.

The *Buckley* Court concluded, 424 U.S. at 20, that because contributions provide financial support only for someone else's speech, a contribution limitation "entails only a marginal restriction" on the donor's First Amendment rights:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. *The quantity of communication by the contributor does not increase perceptibly with the size of his contribution*, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe

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(That case, however, may only stand for the proposition that the district court may—in an extraordinary case and after factual development—certify controlling constitutional issues to a court of appeals (much as they certify all sorts of controlling questions under 28 U.S.C. § 1292(b)), but not that it is required to do so.)

> the contributor's freedom to discuss candidates and issues. . . . [*T*]*he transformation of contributions into political debate involves speech by someone other than the contributor.*

Id. at 21 (emphasis added, footnote omitted). As we show in Part II.A below, this conclusion applies *a fortiori* to contributions of administrative support by an unincorporated association to a political committee: the element of speech by the association and its members is insubstantial.

The justification for limiting such contributions, however, is very substantial. With respect to contributions to candidates, the *Buckley* Court observed:

> It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. . . . To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26-27. As we show in Part II.B below, the section 441a(a)(1)(C) limitation on contributions to political committees, including contributions of administrative support, is essential to close what would otherwise be a large loophole in the limitations on contributions to candidates. Section 441a(a)(1)(C) is plainly constitutional.

A. The Contribution Limitation in Section 441a(a)(1)(C) Imposes No Substantial Restriction on the Freedom of Expression of CMA and Its Members.

CMA and its individual members have many avenues for political expression. First, both the association and its individual members are entirely free to spend unlimited amounts to express their own political views, including their support for any candidate, as long as the expenditures are independent of the candidate and the candidate's committees.[20] Second, each CMA member may contribute $1,000 in cash (plus certain non-monetary assistance) to each of as many candidates as he or she wishes, 2 U.S.C. § 441a(a)(1)(A), subject to a $25,000 ceiling on annual aggregate contributions. *Id.* § 441a(a)(3). Third, each CMA member may contribute $5,000 to each of as many multicandidate political committees, like CALPAC, as he or she wishes, subject to the same $25,000 annual ceiling. Finally, CMA itself may make the same contributions an individual may make, but CMA is not subject to the overall $25,000 limit.[21]

A primary consideration in evaluating claimed infringements of First Amendment rights is the availability of alternative means of communication.[22] In *Buckley*, the Court found that the existence of alternative avenues of political expression and association counted strongly in the balance when it sustained the $1,000 limitation on

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[20] *See* note 5 *supra*.

[21] CALPAC, as a multicandidate committee, can make contributions up to $5,000 to candidates, 2 U.S.C. § 441a(2)(A), up to $15,000 to national political committees, *id.* § 441a(a)(2)(B), and up to $5,000 to other political committees, *id.* § 441a(a)(2)(C).

[22] *E.g., Pell v. Procunier*, 417 U.S. 817, 823-24 (1974); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 561, 568, 575-76, 579 (1973); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

individual contributions. 424 U.S. at 28. In this case, it is substantially clearer than it was in *Buckley* that appellants have other equally good or better avenues of expression. Indeed, since CMA's members can each contribute $5,000 directly to CALPAC, the whole reason for this case is CMA's quixotic insistence that it, rather than its members, be the donor of funds used for administrative expenses.[23]

CALPAC, the entity to which CMA wants to contribute, apparently engages in no speech or expression of its own. It is merely a conduit for contributions to candidates.[24] Since CMA can contribute directly to candidates and since its members can contribute directly either to candidates or to CALPAC, the limitation imposed by section 441a(a)(1)(C) creates no real restraint on anybody's freedom of expression.

Finally, unlike the contributions at issue in *Buckley*, CMA's contributions of administrative support do not

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[23] The Court in *Buckley* declined to find that limits on contributions to candidates and political committees were unconstitutional in the absence of any "indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." 424 U.S. at 21 (footnote omitted). Here, appellants have not even attempted to show that the challenged contribution limitations will have any such "dramatic adverse effect." On its face such a showing would seem impossible to make. Since CALPAC's source of funds for donations to candidates is CMA and individuals who remain free to contribute directly to candidates, the available pool of funds that may be contributed to candidates is not at all diminished.

[24] The complaint makes clear that "[c]ontributions received by CALPAC are, in turn, contributed by CALPAC to candidates for public office, both State and Federal." Complaint ¶ 10, J.A. 8. Although appellants state in their brief that CALPAC "may" make independent expenditures, Brief of Appellants ("Br."), pp. 22, 34, the complaint makes no allegation that CALPAC has made or planned to make expenditures for direct expression.

even symbolically express approval of a particular candidate or of a candidate's stand on any issue. CMA's contributions go instead to a multicandidate committee, which is itself no more than a conduit for contributions; their "transformation . . . into political debate," 424 U.S. at 21, is less certain and far less direct than in *Buckley*. At best, whatever symbolic expression may be accomplished by contributions of administrative support to a multicandidate political committee would not "increase perceptibly" if the statutory ceiling were raised or eliminated. *Id.*[25]

B. The Limitation on Contributions to Multicandidate Political Committees, on Its Face and as Applied to Administrative Support, Is Narrowly Drawn To Serve Compelling Governmental Interests.

The governmental interests served by section 441a(a)(1)(C) are interests that this Court has time and again found to be fundamental.[26] The contribution limitations

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[25] In-kind contributions of administrative support are not entitled to more First Amendment protection than monetary contributions. CMA's admission that "[r]egulation of administrative support has at best a marginal bearing on the use of [contributed] funds in campaigns," Br., p. 33, merely underscores the tenuous connection between administrative support and its transformation into something that CMA wants to say. If CMA cannot make unlimited contributions of office space, clerical services, and postage stamps to a conduit like CALPAC, the only result is that the cost of channeling contributions to candidates through CALPAC may be somewhat increased. But the nondiscriminatory imposition of additional business costs on speech-related activity does not by itself raise a constitutional issue. *See, e.g., Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937).

[26] Long ago the Court declared that corruption attending "the free use of money in elections" was one of the "great natural and historical enemies of all republics." *Ex parte Yarbrough*, 110 U.S. 651, 658, 667 (1884). *See also Burroughs v. United States*, 290 U.S. 534, 545-46 (1934). Campaign reform laws are intended to preserve the integrity of the electoral and governmental processes—an interest itself close to the heart of First Amendment values, *see*

of the Act are intended to prevent both actual undue influence over elected officials resulting from large contributions that leave officials beholden to the contributors, and the appearance of such undue influence.[27] Like the contribution limits sustained in *Buckley*, the limitations imposed by section 441a(a)(1)(C) are directed at these evils.

1. *The Challenged Limitation Serves Compelling Interests.*

Congressional power to regulate political contributions is not limited to enacting laws that check known instances of improper influence. The *Buckley* Court flatly rejected the contention that effective bribery and disclosure statutes fully satisfy the governmental interest and eliminate the need for prophylactic regulation. 424 U.S. at 27-28. To the contrary, the Court held that, in order to ensure that elected officials do not become unduly beholden to a few large donors, Congress could flatly outlaw *any* contributions beyond $1,000. *Id.* at 30-31.

The *Buckley* Court also squarely held that Congress may reinforce contribution limits by other reasonable restrictions. As the Court said in upholding the $25,000 limitation on annual aggregate contributions, *see* 2 U.S.C. § 441a(a)(3):

> [T]his quite modest restraint upon protected political activity serves to prevent evasion of the $1,000

T. Emerson, *Toward a General Theory of the First Amendment* 103-04 (1966)—and therefore raise "issues not less than basic to a democratic society." *United States v. UAW*, 352 U.S. 567, 570 (1957).

[27] *See Buckley v. Valeo*, 424 U.S. at 26-27; S. Rep. No. 93, 93d Cong., 1st Sess. 1-2 (1973); S. Rep. No. 689, 93d Cong., 2d Sess. 4 (1974); *Hearings on S. 1103, S. 1954, and S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. 72 (1973).

> contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.

424 U.S. at 38.

The history of campaign financing reform shows unbounded ingenuity on the part of those who would shop for political influence.[28] Thus, when Congress amended the Act after this Court's decision in *Buckley*, the possibility of evasion remained an abiding concern.[29] Congress believed it necessary to take additional preventive measures.

Congress viewed section 441a(a)(1)(C) as a necessary loophole-closing provision to ensure that political committees did not become a fulcrum for undue political influence.[30] The Conference Report stated that

> [t]he conferees' decision to impose more precisely defined limitations on the amount an individual may

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[28] *See, e.g., United States v. UAW*, 352 U.S. 567, 570-85 (1957) (describing the massive evasion of the campaign reform statute that preceded the present law); Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 364-65 (1977).

[29] For example, Representative Young told the House that "for years we have heard about the need for campaign reform and for years, the Congress has been passing campaign reform bills with loopholes large enough for the supersonic Concorde." 122 Cong. Rec. 5895, col. 3 (1976).

[30] *See* J.S. App. A-9; *Hearings on S. 2911 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 94th Cong., 2d Sess. 89 (1976) (remarks of Senator Griffin); *id.* at 108-09 (statement of Assistant Attorney General Scalia). *See also* 122 Cong. Rec. 6693-94 (1976) (remarks of Senator Cannon). A provision limiting contributions to political committees, which became section 441a(a)(1)(C), was introduced within a month of the *Buckley* decision. *See* H.R. 12015, 94th Cong., 2d Sess. 24 (1976). *See also* S. 3065, 94th Cong., 2d Sess. 27 (1976).

> contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or a multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.[31]

If there were no limit to the contributions an unincorporated association could give to a political committee, there would be no effective limit on the amount the association could channel to a chosen candidate. Were the association free to give unlimited amounts to a multicandidate committee it could obviously dominate the committee, dictate its policies, and effectively direct the committee to make contributions to any candidate or group of candidates the association chose.[32] And because they are subject to no overall ceiling on aggregate annual contributions, such associations could not only give as much as they want to any one committee, they could give as much as they want to an unlimited number of committees, dominating and directing the contribution poli-

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[31] H.R. Rep. No. 1057, 94th Cong., 2d Sess. 57-58 (1976).

[32] The second consideration cited in the Conference Report—assuring that the disclosure provisions upheld in *Buckley* operate as they were intended—is also a substantial concern. Absent the section 441a(a)(1)(C) limitation, a contribution to a candidate from a CMA-dominated committee would, in practical effect, then be a contribution from CMA. Yet the candidate's reports would disclose only that the multicandidate political committee was contributing money, *see* 2 U.S.C. § 434(b)(3)(B), and CMA's predominant role in the contributions would remain hidden from public knowledge.

cies of them all.[33] Congress was surely entitled to conclude that a line should be drawn at $5,000 in order to forestall such activities. Thus, as the court of appeals recognized, J.S. App. A-12, A-17 to A-18, section 441a(a)(1)(C) is necessary to prevent end runs around the contribution limitations that were upheld in *Buckley*.

The section 441a(a)(1)(C) limitation takes on added importance in the context of contributions to multicandidate committees. Because multicandidate committees are permitted to give up to $5,000 to candidates, Congress took special steps to prevent individuals and associations from evading the applicable $1,000 per-candidate contribution limitations by creating multicandidate committees that were merely their alter egos. To this end, as a condition of multicandidate political committee status, Congress required that at least fifty different persons contribute to the committee.[34] This restriction would become meaningless if, in the absence of section 441a(a)(1)(C), domination could be achieved through unlimited contributions.[35]

2. *Section 441a(a)(1)(C) Is Plainly Constitutional as Applied to Contributions of Administrative Support.*

CMA and CALPAC contend that, "[w]hile it may be argued that a limit on monetary contributions to a po-

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[33] For example, if an association were able to funnel $100,000 to each of ten committees—a $1 million stake in all—it could multiply its contributions to candidates tenfold. This possibility for abuse had been observed prior to the 1976 amendments: "By multiplying support committees, a candidate could receive contributions from the same individual up to the legal limit for each committee." D. Adamany & G. Agree, *Political Money* 45 (1975).

[34] 2 U.S.C. § 441a(a)(4).

[35] Appellants and the *amicus* American Civil Liberties Union ("ACLU") cite other provisions of the Act to show that a "comprehensive anti-evasion scheme" exists apart from section 441a(a)(1)(C). *See* Br., pp. 38-39; ACLU Br., pp. 29-31. But these

litical committee is a necessary feature of the anti-evasion provisions of § 441a," section 441a(a)(1)(C) is unconstitutional as applied to limit administrative support, because "[i]t serves no function reasonably related to valid purposes of the Act." Br., p. 32. This attempt to carve out administrative support as a special constitutional case is without merit.

First, CMA simply errs when it suggests that the anti-evasion and pro-disclosure interests served by section 441a(a)(1)(C) do not apply to contributions of administrative support. CMA can as readily dominate, dictate the contribution policy of, and channel funds through a political committee by giving or withholding unlimited administrative support as it can by giving or withholding money. Indeed, as a developed factual record would have shown, the fundraising, solicitation, and other "administrative" activities that CMA wants to provide take up a significant part of a political committee's resources. Earmarking particular dollars for administration—while CALPAC remains free to make candidate contributions with its other dollars—is a meaningless gesture.

Second, even if CMA's voluntary decision to restrict its CALPAC contributions to administrative support were

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other provisions do not address the particular possibilities for abuse that would arise from removing the ceilings on contributions made to multicandidate committees. If CMA dominated one or more multicandidate committees it would have no need to "earmark" its money and section 441a(a)(8) would prevent nothing; CMA would not have to coordinate any "expenditures" since it would control contributions instead, so section 441a(a)(7)(B) would prevent nothing; and CMA-dominated committees would not require any candidate authorization to evade the limits on contributions to candidates, so section 441a(a)(7)(A) would prevent nothing. Finally, section 441a(a)(5) would require difficult threshold factual findings of "establish[ment]" or "control[]" of dummy committees. Congress has ample latitude to enact effective measures like section 441a(a)(1)(C) that will prevent domination directly at its source.

a meaningful limitation, appellants should not be heard to attack the constitutionality of a federal statute on the ground that their private arrangements have cured the evil at which the statute was aimed. A law prohibiting jaywalking can be constitutionally applied even to people who look both ways before crossing. To hold that any individual or organization may divine for itself the evil at which that limit was aimed, impose use restrictions on its own contributions, and then claim exemption from the limit, would work untold mischief.

Especially in the area of electoral reform "the choice of means to [an] end presents a question primarily addressed to the judgment of Congress." [36] Congress has great latitude in drawing lines. Even statutes touching on First Amendment freedoms can, if justified generally by a sufficient governmental interest, constitutionally reach some cases where the justification is less strong than in others.[37] In *Buckley*, for example, the Court found that the $10 and $100 thresholds for the reporting provisions of the law were "indeed low," 424 U.S. at 83; hardly any $10 contribution carries the seeds of undue influence. Nonetheless, the Court sustained these thresholds because the line was "necessarily a judgmental decision, best left

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[36] *Burroughs v. United States*, 290 U.S. 534, 547 (1934).

[37] *E.g., Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 846 (1974) (upholding a blanket prohibition on press interviews in federal prisons and rejecting the claim that interview requests could constitutionally be denied only after an individualized finding that a particular interview would present administrative or disciplinary risks). *See also Procunier v. Martinez*, 416 U.S. 396, 414 (1974); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100-02 (1947). Courts are reluctant to second-guess congressional judgments about where lines should be drawn in regulating the conduct of elections, even when the lines are alleged to impinge on First Amendment or other fundamental rights. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 142-44, 240-49, 278-81, 282 (1970); *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1200-02 (D.C. Cir. 1974). *See also* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199, 228-30 (1971).

in the context of this complex legislation to congressional discretion." *Id.*[38]

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[38] Appellants attack section 441a(a)(1)(C) "for the narrow purpose" of vindicating CMA's claimed right to provide unlimited administrative support. Br., pp. 19-20. The ACLU, however, argues an entirely different, and hypothetical, case that touches on the right (not involved here) of individuals jointly to make independent expenditures to express their own political views. The ACLU takes a very restrictive and almost certainly erroneous interpretation of section 441a(a)(1)(C), assuming it would operate to prevent a "two-person independent spending committee" from jointly taking out any advertisement in a major metropolitan newspaper. The ACLU concedes, ACLU Br., p. 14 n.*, that the case it argues is currently on appeal to the D.C. Circuit from the district court's decision in *Mott v. FEC*, 494 F. Supp. 131 (D.D.C. 1980), dismissing the case as not ripe because plaintiff had not first sought the FEC's view of the statute through the advisory opinion mechanism in 2 U.S.C. § 437f. That case, quite obviously, is not the case now before this Court. The certified questions below and here simply do not present the issue that the ACLU argues, *see* J.S. App. A-2 to A-3 n.1, and the issue is no more ripe here than in *Mott*.

Because the activity of appellants is within the "hard core" of conduct that may be regulated, this Court should reject the overbreadth argument made by the ACLU. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Adjudication based on facial overbreadth of a statute is "fundamentally at odds with the function of the federal courts in our constitutional plan," *Younger v. Harris*, 401 U.S. 37, 52-53 (1971), and has been undertaken by this Court "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613. Moreover, Congress provided an advisory opinion procedure, *see* 2 U.S.C. § 437f, which eliminates any chilling effect that the sanctions of the Act might otherwise have, *see Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir. 1980), and therefore eliminates any reason for considering any claims of alleged overbreadth.

In any event, the ACLU is altogether wrong in assuming that the FEC would construe the activities of a "two-person independent spending committee" to be a "contribution" to a "political committee." That hypothetical activity does not involve any transfer of control over funds to any organization separate from the contributors. This Court should not explore the far reaches of First Amendment doctrine simply because the ACLU says it can imagine —erroneously—a draconian application of the challenged provision. *Parker v. Levy*, 417 U.S. 733, 760 (1974); *Boyle v. Landry*, 401 U.S. 77 (1971).

III. THE COURT BELOW CORRECTLY HELD THAT LIMITING THE VALUE OF CMA'S ADMINISTRATIVE SUPPORT TO CALPAC DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST APPELLANTS.

Appellants attack section 441a(a)(1)(C) on equal protection grounds, alleging that it denies an unincorporated association like CMA the opportunity to contribute unlimited administrative support to an affiliated political committee, although other provisions of the Act, not challenged here, permit corporations and labor unions to donate unlimited administrative support to their separate segregated funds.[39] The court of appeals correctly rejected this claim.[40] The Act imposes fewer and less onerous restrictions on unincorporated membership associations than on corporations and labor unions. Therefore, as compared to those organizations, the Act does not discriminate against appellants at all.

A. CMA, as an Unincorporated Association, Suffers No Invidious Discrimination Under the Act.

Appellants' equal protection claim must fail because they are not part of a group burdened or "disadvantaged by the classification."[41] They cannot "demonstrate

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[39] Sections 441b(b)(2)(C), 431(8)(B)(vi), and 431(9)(B)(v) exempt from the definitions of "contribution" and "expenditure" the costs incurred in "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C). Administrative services, *see* 11 C.F.R. § 114.1(b) (1980), provided by a corporation or labor union to a separate segregated fund thus are not contributions or expenditures.

[40] *See* J.S. App. A-24.

[41] *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). As this Court said in *Califano v. Boles*, 443 U.S. 282, 295 (1979): "In order to make out a disparate impact . . ., it is necessary to show that the

in the first instance a discrimination against them of some substance." [42] When the statutory scheme created by the Act is assessed as a whole, as decisions of this Court require,[43] it is clear that the Act does not burden or disadvantage CMA and CALPAC in their ability to participate in the federal electoral process—it favors them.

Although the value of administrative support provided by an unincorporated association to a connected political committee must be counted as part of the $5,000 limit on contributions, unincorporated associations like CMA have avenues for participating in the political process not available to corporations or unions. They can contribute to candidates and their authorized committees, the political committees of national political parties, and other political committees within the limitations of section 441a(a)(1). Significantly, associations are free to make these types of contributions without any overall cap on the amount that they may contribute, while individuals are limited to an aggregate of $25,000 per year for all contributions.

By contrast, corporations and labor unions may not make any contributions at all. Section 441b(a) states: It is "unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election . . . ." 2 U.S.C. § 441b(a). To ameliorate the force of this restriction, which does not apply to unincorporated associations, Congress gave to corporations and labor unions the oppor-

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class which is purportedly discriminated against consequently suffers significant deprivation of a benefit or imposition of a substantial burden." *See also Zablocki v. Redhail*, 434 U.S. 374, 387-88 & n.12 (1978); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 166 (1977).

[42] *American Party v. White*, 415 U.S. 767, 781 (1974).

[43] *See Williams v. Rhodes*, 393 U.S. 23, 32, 34 (1968); *Buckley v. Valeo*, 424 U.S. at 98-99.

tunity to establish and administratively support "separate segregated fund[s] to be utilized for political purposes." [44]

Against this background, it is difficult to take seriously the claim that appellants are treated less favorably than corporations or unions.

B. Substantial Governmental Interests Support the Different Treatment Accorded Unincorporated Associations.

Even if this Court examines solely those statutory provisions concerning administrative support, rather than the structure of the Act as a whole, there is no equal protection violation. Congress saw substantial reasons for not limiting the amount of administrative support that corporations and unions can give to their separate segregated funds, while imposing such limitations on unincorporated associations. These are more than sufficient to defeat an equal protection attack.

Wishing to "purge national politics of . . . the pernicious influence" of great aggregations of wealth,[45] Congress saw fit to prohibit unions and corporations from using general treasury funds to contribute to candidates or to spend in federal elections.[46] To give corporations

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[44] 2 U.S.C. § 441b(b)(2)(C). The Act strictly regulates the method by and frequency with which the corporation or labor union may solicit contributions for the separate segregated fund. *See id.* § 441b(b)(3), (4), (5), (6). These regulations do not apply to a political committee, like CALPAC, connected to an unincorporated association.

[45] *United States v. UAW*, 352 U.S. 567, 572 (1957).

[46] Congress was also concerned that a shareholder or union member may not hold the same political views as the corporation or union. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 429-31 (1972); 117 Cong. Rec. 43379-81 (1971) (remarks of Representative Hansen offering legislation now codified in much the same form at 2 U.S.C. § 441b(b)(2)(C)).

and unions limited opportunity to participate in federal elections, however, Congress permitted them to establish and administer separate funds, to be financed only from voluntary contributions.

Congress apparently felt that it would not be feasible to limit the administrative support that corporations and unions could give to their separate segregated funds.[47] Given the links between the personnel and resources of the corporation or union and the effective functioning of a separate segregated fund, Congress concluded that "it is not . . . possible completely to separate the resources and facilities made available to the fund."[48] Believing that the support for the services required to administer the fund "cannot be thus readily segregated,"[49] Congress exempted corporations and unions from the $5,000 limit on contributions of administrative support, since, as the court of appeals said, "[w]ithout the exemption for administrative support, corporations and unions simply could not maintain segregated funds." J.S. App. A-23.

By contrast, Congress did not expect that a multicandidate political committee need be so tied to one person, and therefore so dependent upon administrative services, not segregable, from that one person. Indeed, Congress expected just the opposite: under the Act, qualified multicandidate committees are required to receive funds from at least 50 separate sources. 2 U.S.C. § 441a(a)(4).

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[47] *See* 117 Cong. Rec. 43380, col. 3 (1971) (remarks of Representative Hansen); *id.*, at 43384 (remarks of Representative Thompson). *See also Pipefitters Local Union No. 562 v. United States*, 407 U.S. at 418-19, 426.

[48] *See* H.R. Rep. No. 2093, 78th Cong., 2d Sess. 5 (1944). Representative Hansen referred to this earlier legislative history when explaining what is now section 441b(b)(2)(C). 117 Cong. Rec. 43380, cols. 2-3 (1971).

[49] H.R. Rep. No. 2093, 78th Cong., 2d Sess. 5 (1944).

There was no need, therefore, to exempt such committees from restrictions on receipt of unlimited contributions of administrative support. In fact, since Congress intended that multicandidate committees not be dominated by one person lest they become vehicles for evading the per-candidate contribution limits, Congress had strong reasons for its decision not to exempt administrative support contributions by unincorporated associations to multicandidate committees. In addition, given the other avenues of participation, there is no need for anyone, other than corporations and unions, to participate in political activity strictly through another organization or fund.[50]

In view of these substantial differences, Congress was not constitutionally required to take the same approach with unincorporated associations and their related political committees as it took with corporations and their separate segregated funds.[51] *Katzenbach v. Morgan*, 384

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[50] Appellants themselves suggest another sound basis for the different treatment of administrative support. If the costs of establishing and administering a separate political fund or committee are so significant as to affect the ability of the fund or committee to engage in political activity, *see* Br., p. 20, then Congress was completely reasonable in permitting corporations and labor unions, which have no voice in federal elections except through their fund, to bear the costs of operating the fund so that each voluntary contribution to the fund is given to a candidate. *See* 117 Cong. Rec. 43381, col. 1 (1971) (remarks of Representative Hansen); *id.* at col. 3 (remarks of Representative Hays). Just as reasonably, Congress had less need to ensure the maximum effectiveness of the contributions to a political committee connected to an unincorporated association, which can itself make direct contributions and unlimited expenditures.

[51] *Cf. Bread Political Action Comm. v. FEC*, No. 80-1146, slip op. at 16 (7th Cir. Dec. 5, 1980) (*en banc*) ("dissimilar treatment of corporations, labor organizations, . . . and trade associations . . . follows from the rather obvious facts that each of the different groups has a different structure and different kind of constituency"). Laws that treat corporations favorably, like those relating to "limited liability, perpetual life, and the accumulation, distribution, and taxation of assets," *First Nat'l Bank v. Bellotti*, 435

U.S. 641 (1966), for example, involved a challenge to a federal statute that extended the right to vote to all those educated within the jurisdiction of the United States, thus abrogating state English-literacy requirements. Respondents challenged the statute on the ground, *inter alia*, that it violated equal protection principles because it did not also exempt those not educated in American-flag schools from the English-literacy requirement. The Court refused to apply "the closest scrutiny of distinctions in laws" even though the challenged statute involved the right to vote. Instead, it sustained the validity of the statute, because it could imagine a number of factors that "might well have been the basis for the decision of Congress." *Id.* at 657-58. The *Morgan* Court observed that a "statute is not invalid under the Constitution because it might have gone farther than it did," [52] and that Congress may "address[] itself to the phase of the problem which seems most acute to the legislative mind." [53]

This same equal protection analysis has been used to evaluate statutes that may have incidentally implicated

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U.S. 765, 802, 809 (1978) (White, J., dissenting), are embedded in American law; this Court has upheld such laws as long as the different treatment is not shown to be arbitrary or irrational. For example, in *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932), the Court sustained a statute that permitted domestic corporations, but not individuals, to exclude from taxable income any revenue earned outside of the state. The Court refused "to assume that there is no state of facts reasonably to be conceived which could afford a rational basis for" the distinction. *Id.* at 283. *Cf. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (affirming "the narrow confines of judicial review" applicable to statutory distinctions between corporations and others).

[52] 384 U.S. at 657 (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929)).

[53] *Id.* (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)).

First Amendment values by making it easier for some to express their views than others. Thus, in *Buckley v. Valeo*, the Court, quoting *Morgan*, upheld the part of the election laws that provided funding for primary campaigns, even though it was alleged to disadvantage candidates not running in party primaries.[54]

So here, Congress decided to impose a different—and stricter—regime on corporations and unions than on others because it regarded the problems incident to corporate and union activity as more acute. Its decision to "go no farther than it did" and to go "one step at a time" is rationally related to functional differences between corporations and unions and others and is constitutional under *Morgan* and *Buckley*.

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[54] 424 U.S. at 105-06. *See also Taxation With Representation v. United States*, 585 F.2d 1219, 1224 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979) (Congress had "a reasonable basis" for permitting veterans organizations and fraternal societies, but not other charitable organizations, to lobby and still enjoy certain tax benefits, including the right to receive tax-deductible contributions).

Unlike the statutes in *Carey v. Brown*, 48 U.S.L.W. 4756 (U.S. June 20, 1980), and *Police Dep't v. Mosley*, 408 U.S. 92 (1972), the Act does not distinguish on the basis of the content of speech.

CONCLUSION

For the reasons set forth above, if it elects to reach the merits the Court should affirm the judgment of the court of appeals upholding the constitutionality of the Act.

Respectfully submitted,

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